NO. 80-1299

Office-Supreme Court, U.S.
FILED
FEB 2 1981
ALEXANDER L. STEVAS,
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1980

BRUNO DOMENICO MAZZA,
*Petitioner,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ARNOLD E. WALLACH
*Attorney for Petitioner*
225 Broadway
New York, N.Y. 10007
(212) 227-0959

*Of Counsel*
HERMENA PERLMUTTER

DICK BAILEY PRINTERS, 290 RICHMOND AVE., S.I., N.Y. 10302
TEL.: (212) 447-5358 — (516) 222-2470 — (914) 682-0848

## QUESTIONS PRESENTED FOR REVIEW ARE AS FOLLOWS

Was there a rational consideration of all the evidence adduced against the Petitioner at the trial by the jury so that a finding of guilt beyond a reasonable doubt was warranted?

Did the Petitioner validly consent to the federal agents searching a retail store where the property involved in this case was seized by the federal authorities and used as evidence by the prosecution where the authorities had no search warrant?

A list of all the parties to this proceeding whose judgment is sought to be reviewed is contained in the caption of this case.

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**IN THE**
**SUPREME COURT OF THE UNITED STATES**
**October Term, 1980**

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BRUNO DOMENICO MAZZA,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

The Petitioner, BRUNO DOMENICO MAZZA, respectfully prays that a Writ of Certiorari issue to review the Judgment Order of the United States Court of Appeals for the Third Circuit entered in this proceeding on December 5, 1980. It appears, that said Petitioner was indicted by a Federal Grand Jury for the District of New Jersey. The indictment contained three counts founded on 18 U.S.C. 659 and 2 (First Count); 18 U.S.C. 659 and 2 (Second Count) and 18 U.S.C. 2315 and 2 (Third Count).

**JURISDICTION**

The Judgment Order of the Court of Appeals for the Third Circuit was entered December 5, 1980. This petition for certiorari was filed within sixty days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section

1254(1). There was no petition filed nor application made for a rehearing in the Court below.

The table of contents and table of authorities required under Rule 33.5 is hereinbefore set forth.

The opinion of the said Court of Appeals is contained in the Judgment Order, dated December 5, 1980, appears in Appendix A hereto. No opinion was rendered by the United States District Court for the District of New Jersey, the judgment of which was appealed to the said United States Court of Appeals for the Third Circuit.

## THE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

*Fourth Amendment. "Searches and Seizures.* The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

*Fifth Amendment.* " . . . nor be deprived of life, liberty, or property, without due process of law; . . . "

*18 U.S.C.2. "Principals.* (a) Whoever commits an offense against the United States of aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.* * *"

*18 U.S.C. 659.* "Whoever buys or receives or has in is possession any such goods or chattels, knowing the same to have been embezelled or stolen; . . . "

"Whoever receives, conceals, stores . . . any goods, wares or merchandise, . . . of the value of $5,000.00 or more, moving as, or which are a part of, or which constitute interstate or foreign commerce knowing the same to have been stolen . . . ;"

## STATEMENT OF THE CASE

### THE MOTION TO SUPPRESS THE EVIDENCE WHICH WAS DENIED IN THE TRIAL COURT AFTER AN EVIDENCIARY HEARING

As the facts will divulge, there were two searches and seizures of property which were involved in the three counts of the indictment. The first count was ultimately dismissed upon motion by the government because the jury failed to arrive at a verdict.

However, certain events in regard to the first count will be referred to herein so as to clarify the issues.

The first search in this case was of a store not owned by the Petitioner and located at 6400 Broadway, West New York, New Jersey (5A, 6A, 22A).* The second search and seizure was at another retail store known as the Maryann shop at 7418 Broadway, North Bergen, New Jersey and it was that store that the government claimed the Petitioner owned or had an interest in. That was the store that was ultimately searched and seizures made therein and the evidence served to support the second and third counts of the indictment (29A, 31A, 32A). The second and third counts involved possession of stolen property at the second store located at 7418 Broadway, North Bergen, New Jersey. Hence the facts adduced at the evidentiary hearing to suppress the evidence will pertain to the second and third counts.

Kevin P. Donovan, a federal agent, on direct examination testified that on August 16, 1979 he arrested the Petitioner at the first store. Another agent named

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* ( ) This refers to the pagination of the appendix served and filed by the Petitioner in the court below.

DeBellis, told him that one Perez was the owner of that first store who told him that the Petitioner "owned" a store named the Maryann Shop nearby (29A-31A). The Petitioner, when arrested, was handcuffed. While in custody Donovan questioned the Petitioner. He also informed the Petitioner that he could voluntarily "consent" to a search at a certain store adding that the Petitioner could also refuse to consent and "require a search warrant if he so desired" (31A). According to Donovan the Petitioner had "no objection" but insisted that the handcuffs be removed so that the customers or his wife at the second store would not be upset. Donovan also testified that the Petitioner told him he was a "co-owner." Thereupon, the Petitioner and the agents went to the second store. Shortly before arriving there the handcuffs were removed from the Petitioner. At the second store the Petitioner's wife, mother-in-law, the Petitioner's sons and daughter were there (31A, 32A).

Donovan described the store as being 15' wide and 39' long but the front part being 12' (33A).

The witness then described the various merchandise, the manufacturers names and the markings of cartons containing certain goods (34A-37A), Government's Exhibits 99, 100, 101, 102).

Donovan also called the manufacturer who sent a representative to that store to ascertain whether the goods belonged to the manufacturer (38A, 39A).

In regard to Mrs. Mazza, the Petitioner's wife, Donovan also questioned her inquiring from the ownership of certain merchandise and she showed him from indicia of ownership indicating the acquisition thereof (40A).

The agent described the various types of merchandise he saw there and the various firms that made the merchandise and forwarded such merchandise. The Petitioner was taken to jail. About 1½ hours later Donovan and the

agents returned and questioned Mrs. Mazza (40A-47A, Government's Exhibit 133D). For certain items, namely phonographs records and tapes (these were involved in the third count of the indictment) and medical equipment, Mrs. Mazza produced no records showing acquisition (44A, 46A, 47A, 50A).

The Court denied the motion on the basis of "consent" citing *Schneckloth v. Bustamont,* 412 U.S. 218. (55a, 56a) See Appendix B, infra.

## THE TRIAL

At the trial, Kevin Donovan, the agent who testified at the suppression hearing testified that he first saw the Petitioner at the first store located at 6400 Broadway, on August 16, 1979 (57A). When arrested the Petitioner was advised of his "rights" and the Petitioner stated that he would respond to the witness' questions without a lawyer (58A). Among other things, the Petitioner told him he was the co-owner of the "Maryann Shop" located at 7418 Broadway, North Bergen, New Jersey, the Petitioner describing it as a clothing store (58A). The Petitioner and the agents then proceeded to that store (61A, 62A).

The agent described his observation of that store and the contents thereof (62A, Government's Exhibit 101). Donovan also contacted a "Jamesway Corp." because that name appeared on a carton. That corporation sent a representative to the establishment who claimed ownership of the merchandise in question (64A, 65A).

The agent questioned Mrs. Mazza, the Petitioner's wife, as to the records denoting ownership or acquisition of the merchandise and according to Donovan she didn't produce any for the goods involved in counts 2 and 3 of the indictment (65A, 68A).

Certain "medical equipment" was also found at that store (it appears that these were not involved in any

specific count but may have been introduced in evidence as an uncharged crime to show intent or knowledge).

However, Mrs. Mazza did provide some invoices or documents indicating acquisition and ownership but not all that were asked for by the agents. Invoices found at the store relating to clothing on racks were in another name, that is other than the "Maryann Shop" (75A). Bathing suits had Sears & Roebuck labels (75A).

Donovan also spoke to the landlord of the store and procured a lease which was in the name of Anna Marie Bisogno (this appears to be the name of the Petitioner's wife) (79A).

Anna Bisogno Mazza, the wife of the Petitioner testified for the defense (92A). She was the owner of the store at 7418 Broadway, North Bergen, New Jersey, having acquired it in 1978 (93A). At those premises she operated a retail and wholesale business (94A).

Petitioner's Exhibit 1 was the lease of the store and was in her name, that is her maiden name (94A, 95A). Also received in evidence for the defense and the subject of her description were various licenses and certificates issued by the local author ties to operate the premises (95A-97A, 98A, 99A, Petitioner's Exhibits 1, 2 and 3).

Mrs. Mazza was also questioned on direct examination as to the various invoices showing the source of the items of merchandise in the store (101A-111A, Petitioner's Exhibits 4-8, 10, 11, 11A, 115A).

Her testimony also showed her acquisition of general merchandise from an establishment having the trade name F&T General Merchandise (109A, Petitioner's Exhibit 8). She related that the seller of these goods sold various items of clothing for men and women (108A, 109A).

She told the jury that she bought various items of clothing for men and women from various manufacturers and had the invoices to show the purchase thereof (115A-118A, Petitioner's Exhibit 17). However, she

couldn't find the invoices for the medical equipment found in the store because at the time the agents entered with her husband she was nervous and upset (126A).

She also related that after the agents left the premises a carton of men's shorts were missing (128A, 129A). This merchandise was involved in the second count of the indictment (129A). She testified these were acquired by her from a salesman (129A). During the search she objected to the agents seizing mechandise (132A).

On cross-examination, among other things, she was questioned as to whether the Petitioner ever purchased anything for the store and she replied that on the very day of the arrest she sent her husband to the premises he was arrested at to purchase perfume (149A).

Questioned about the licenses she stated that she had no license to sell tapes and records (156A). She denied that she ever told the agents that she paid $200.00 for the tapes and records (160A). To the contrary, she told the agents she paid $1,000 for them (161A). Moreover, she gave a receipt for those items to the agents (163A, 167A). She also gave the agents an invoice for boxes of shorts that they seized (174A, 175A). These were acquired from a salesman (176A, 177A). She could not recall telling the agents she paid $200.00 for those items (182A). She never asked the vendor of those whether they were stolen nor did the vendor ever show her proof of ownership (180A, 181A).

Questioned about the unlabeled merchandise, Mrs. Mazza testified that she never thought that that condition disclosed the theft of such merchandise (185A).

She told the jury that the Petitioner had nothing to do with the store and that the Petitioner didn't pay the landlord two installments of rent (206A, 207A).

She was then confronted with government's Exhibits 400-413 which contained the Petitioner's signature. These

disclosed the renting of a car by the Petitioner (209A-212A, Government's Exhibits 403, 404, 407, 412). These papers showed that the rental was in the name of the store Mrs. Mazza owned (213A).

On redirect examination Mrs. Mazza testified that the store sold merchandise at discounts and that all sorts of salesmen went there. In other words, she purchased varieties (218A, 219A). She allowed the Petitioner to rent a car under the name of the store and that the Petitioner did pay the rental for the car (223A). The Petitioner used his car for his own purpose, that is, he was a salesman (224A). However, he did not work for the witness (224A).

Initially, when the store was first rented it was taken in her name, however, the Petitioner advanced two months rent for it (226A, 227A).

The next witness for the defense was Anthony Iafelice, Jr. He testified that he was in the real estate business and he rented the store in question (231A). Mr. Mazza furnished the rental security (232A). However, the Petitioner instructed the witness that the receipt was for the rental of the store to Mrs. Mazza (233A, 236A, 237A). Thus, the witness explained that while certain receipts were in the name of the Petitioner they were inserted there by mistake and that the Petitioner told the witness that his wife's name should have been inserted there. Further, that he was instructed that the lease was to be in the name of Mrs. Mazza because it was to be "her store" (237A).

## REASONS FOR GRANTING THE WRIT

### THE JUDGMENT ORDER AND THE DECISION UNDERLYING THE SAME OF THE COURT BELOW HAS DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH THE APPLICABLE DECISIONS OF THIS COURT.

### THE VERDICTS OF THE TRIAL JURY WERE NOT RATIONALLY SUPPORTED BY THE EVIDENCE

The rights of the surviving counts of the indictment, Counts 2 and 3, as aforesaid, do not allege that Petitioner aided and abetted or was an accessory to the commission of the crime. Such counts do not disclose whether the theory underlying the prosecution was based on the principal role of the Petitioner whether he was a principal or an accessory. See, *Standefer v. U.S.* ____U.S.____, 1980, 64 L.Ed. 2d 689 (1980).

It is the Petitioner's submission to this Court that there was no evidence to show that Petitioner joined with his wife or anybody else in the commission of the acts involved. It will also be argued that on no rational consideration of the evidence would the Petitioner be found or should have been found guilty under Counts 2 and 3.

The basic issue herein is whether the Petitioner possessed the property described in the second and third counts of the indictment. While 18 U.S.C. 2315 penalizes the corrupt receipt, concealment and storage of stolen property, it is submitted, that there is commonality between that Section and Section 659. Thus, possession of such property could be evidence to support a conviction under both statutes. It would appear that whether the jury accepted the Petitioner's wife's testimony as to being in sole possession and control of the premises, or not, there was

"no possession" on the part of the Petitioner as to the property described in the second and third counts of the indictment. It would seem that the theory advanced against the Petitioner was that because the Petitioner's wife was in possession of the store and the Petitioner allegedly admitted to the authorities that he had an interest in the store, therefore, he had "possession" of joint control over the contents of the store, namely, the merchandise. Factually, the "admission" attributed to the Petitioner was limited. It merely was to the effect that he had an interest or was a co-owner of the store. Such admission did not extend to knowledge of the nature of the goods of the store or what kind of goods were in the store or how the goods were acquired. Therefore, to reason that because one has an interest in a store, therefore, one possesses the contents of the store, is not, it is respectfully submitted to this Court logical. Retail stores it may be recognized may carry a myriad of items. To conclude from that that a person who has an interest in the premises or the "store" is in possession of the items does not follow. Possession in this case, was extended to joint constructive possession and as will be argued below, joint and constructive possession are words that have a secondary meaning.

The trial court told the jury as to possession that that body could find actual or constructive possession (323A). Finally, the Court charged a permissible inference of knowledge of the larcenous nature of the goods if the petitioner possessed items (323A, 324A).

It was brought to the Court's attention that there was no "actual or constructive or joint possession" (282A). Counsel in arguing for a judgment of acquittal pointed this clearly out. It is, therefore, submitted in this regard that the Court's instruction on pages 322A and 323A was objected or accepted to within the purview of Rule 30 of the Federal Rules of Criminal Procedure. Even as to that,

the Court nowhere explained the highly technical and elusive nature of actual, constructive or joint possession. However, under any view of this case there simply was no evidence whatsoever not only of actual possession but even of "joint or constructive possession." *U.S. v. Bonham,* 477 F.2d 1137 (Cir. 3d En Banc 1973). The factual setting of that case was the usual narcotics case where in executing a warrant entry was made on the home of the defendant's mother who lived with her two sons who were also charged and others. In executing the warrant the authorities entered a room where the defendants slept. There, the narcotics were retrieved. "Possession" under the then federal statute generated the presumption of knowledge as element to the crime. Consequently, this court had before it a substantial issue of "possession" where two people shared a bedroom. The Court then analyzed the concept of "constructive possession," at page 1138. It was stated in part at page 1139:

> "This reasoning must be squared, with the requirement that every essential of a crime must be established beyond reasonable doubt. But the better reasoned cases reject it . . . As the court said in Evans v. United States, supra, since he was not in constructive possession of the premises, he may not be inferred that he knew of the presence of narcotics and had possession over them, unless there are other incriminating statements or circumstances tending to buttress such an inference. Here there was nothing except the joint occupance of the room upon which an inference of possession could be based. A fact finder could only speculate whether both of the room's occupants or a particular one of them even knew of the cache, much less exercised control over the hidden contraband." (Internal quotations and citations omitted).

It is now submitted there was no "possession" that could be attributed to the Petitioner, either actual or constructive.

Even accepting the admission attributed to the Petitioner that he owned, or had an interest in the store, there is no admission that he had an interest in the goods. A person could very well have an interest in premises over any part of the contents. Not one witness in this case testified that the Petitioner physically handled the goods, acquired the goods, concealed the goods, had sold or even knew the goods were in the store. Recognizing that one could jointly or "constructively" possess property, it is also submitted that there was no showing that the Petitioner had any dominion or control over the goods or could dispose of the goods. There was not one shred of evidence in this case that the Petitioner even had a key to the store. There was no evidence in this case that the Petitioner was regularly at the store, managed the store, helped his wife, or helped conduct the business. In *Bozza v. U.S.*, 330 U.S. 169 (1947) an Internal Revenue Statute making custody of a still in violation of the designated Federal Statute, was in issue. The conviction was reversed, it being stated on pages 163-164, in part, that:

> " . . . Here again the statutes treat custody or possession as a wholly distinct offense. Yet there was no testimony that the petitioner ever exercised or aided the exercise of, any control over the distillery. His participation in carrying the finished product by car does not fit the category of custody and possession so nearly as to resemble transportation of illegal liquor . . . an offense which the Circuit Court of Appeals has found the evidence insufficient to prove. Nor was there any testimony that the petitioner acted in any other capacity calculated to facilitate the custody or possession such as, for illustration, service as a caretaker, watchman, lookout, or in some similar capacity . . . "

Recognizing that "possession of contraband is difficult to establish, Congress in the statutory context of *Bozza, supra,* attempted to ease the burden by providing for an "inference" of possession if one is present at an unregistered still or a still illegally maintained, such inference subject to rebuttal by a satisfactory explanation of the presence. This statutory inference was likewise voided by the United States Supreme Court in *U.S. v. Romano,* 382 U.S. 136 (1965) as not meeting the due process requirement of rationality, at pages 143-144. It was stated, in part, that:

> " . . . The amendments, . . . permitted an inference of possession from the mere fact of presence. Moreover, the inference was not irrebuttable. It was allowed only if the defendant failed to explain his presence to the satisfaction of the jury. Plainly, it seems to us, the defendant would be exonerated if he satisfactorily explained or the circumstances showed that his functions at the still was not in furtherance of the specific crime of possession, custody or control. If a defendant is charged with possession and it is unmistakeably shown that the delivery, for example, was his sole duty, it would seem very odd . . . to hold that his explanation had merely proved his guilt of possessing by showing some connection with the illegal business . . . " (Omitting internal quotations and citations).

To paraphrase the holding above in *Romano,* it would seem the only connection the Petitioner in this case had with the alleged illegal business was that he was married to the owner. Even if the Petitioner had more than a relationship to his wife, e.g. transported or handled goods for the store, that would not make him an accessory under 18 U.S.C. 2. See, *U.S. v. Bryan,* 483 F.2d 88 (Cir. 3d 1973), holding that one is not an accessory or accomplice unless one shared the feloneous intent with the other parties, at page 92.

In this case there is no proof whatsoever, not one shred of evidence that the Petitioner "shared" any wrongful possession that could be attributed to the Petitioner's wife.

Nor was there any showing that the Petitioner in any way was an accomplice of his wife. The Court charged accomplice liability on pages 330A and 331A. It was recharged on page 335A. The issue presented is that there was no evidence that the Petitioner aided and abetted anybody. Firstly, the Court on pages 283A and 284A made the comment that after Mrs. Mazza's testimony she could have been indicted. Be that as it may, whether Mrs. Mazza's testimony was disfavored or not that did not establish that the Petitioner was her business partner in the venture under consideration. Even if Petitioner, her husband, may have been seen in the store, there is no evidence of this. Or if the Petitioner rented a car in the name of the store, that does not show criminal complicity, and that while guilt by association is not a recognizable crime unless more be shown, it is submitted that marriage is not a partnership in crime. As was stated in *U.S. v. Barber,* 429 F.2d 1394 (Cr. 3d 1970) knowing people or being in a group, members of which may commit a crime does not make a person an accomplice. As stated on page 397, in part:

> "This conclusion finds ample support in case law. In order to aid and abet another to commit a crime it is necessary that a defendant 'in some sort associate himself with the venture, i.e., the criminal enterprise, that he participate to bring about, that he seek by an action to make it succeed.' United States v. Peoni, 2d Cir. 1938, 100 F.2d, 402, quoted with approval in Nissen v. United States, 1949 336 U.S. 69 C. Ct. 766, 93 L. Ed. 919. Therefore, mere presence at the scene of a crime, even in the company of one or the principal wrongdoers, does not make one an aider or abetter . . . .

> In addition, the conduct of the individual charged or other special circumstances attending his presence must be such as to show that he has associated himself with and participated in the criminal undertaking. Something of significance beyond the fact of presence is necessary to justify a conviction. This requirement is an essential safeguard against the ever present danger of assuming the complicity of all in attendance whenever group activity is involved, and specially when many members of a group, actors as well as onlookers, are tried together. The courts have the responsibility to make sure that mere speculation is not permitted to substitute for proof in such cases. In the circumstances of the present case, any conclusion that Loper was aiding and abetting criminal misconduct was wholly speculative."

The Court holding in *U.S. v. Cades* in regard to the appeal of Bloom, 495 F. 2d 1166 (Cir. 3d, 1974). Bloom was charged under 18 U.S.C. 2 with being an accessory to Cades in a crime involving the misapplication of bank funds under 18 U.S.C. 656. Cades, an officer of the bank, interposed a plea of nolo contendre. Bloom went to trial. The theory of the case against Bloom was that he aided Cades. This Court reversed the convictions in regard to Bloom holding that accessorial liability could be established by the government showing that:

> "To convict Bloom of aiding and abetting, the Government must further show that he facilitated Cades' violations of §656 and that Bloom intended to facilitate that violation . . . In order to aid and abet another to commit a crime it is necessary that a defendant in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his actions to make it succeed . . . " (omitting internal citations and quotations).

The evidence underlying the conviction was that Bloom may have been guilty of a mail fraud in which he was not charged, but not for the charge underlying the conviction. It was held that Bloom's acquaintance or association or collaboration with the principal (Cades) was held insufficient where the association or collaboration was not part of a joint venture in crime, at page 1169, 495 F.2d.

It was further held that Bloom, whatever his criminal activities, was acting on his own and not to aid the principal. This disposed of the substantive count. It was next held by this Court at page 1169 that the evidence was likewise insufficient to establish conspiracy because of a failure to show a corrupt agreement to violate the only statute under consideration.

So also in this case. The Petitioner's marriage to Mrs. Mazza did not involve and was not shown to involve any criminal joint venture. According to his wife's testimony she acted on her own. Whatever view one takes in this case there was a complete failure to establish that the marital association or a relationship to advance the occurrence involved in Counts 2 and 3 of the indictment.

Furthermore, the alleged admission attributed to the Petitioner was not valid. The Petitiner was in custody. Any verified confessions or admissions by themselves have been deemed to be without probity. Therefore, have to be corroborated. See, *Wong Sun v. U.S.*, 371 U.S. 471 (1963) at pages 488-489. Especially footnote 15.

Even if initial receipts for the store were given to the Petitioner in his name or he rented a car in the name of the store no reasonable view of the evidence can support any inference that the Petitioner had joint custody or control of the goods in the store whether acquired wrongfully or rightfully. In *Vachon v. New Hampshire,* 414 U.S. 478 (1974), the petitioner was convicted in a state court because a 14 year old girl went to the store he owned and

bought a button which had an offensive statement on it. The petitioner was convicted for contributing to the delinquency of a minor. The conviction at the state level was affirmed because it was held that the petitioner acted voluntarily and intentionally, did not make a mistake, or did not act innocently or accidentally. It was required that the prosecution prove that the petitioner acted "knowingly" and personally sold to the minor the button or caused the sale to her. The Supreme Court of the United States in reviewing the adequacy of the proof as a matter of due process of law and as the standard then to review state convictions held that there was no evidence that the petitioner personally sold the offensive article to the minor or was even aware that she was present at the store at the time of the sale. The minor herself could not testify that she saw the petitioner in the store. There as in this case, the petitioner made an admission that he "controlled the premises on July 26," that would be the date of the sale. In reversing this Court in part stated at page 479 that:

> ". . . That concession was evidence at most that he operated the shop; it was in no way probative of the crucial element of the crime that he personally sold the minor the button or personally caused it to be sold to her."
>
> "In these circumstances the conviction must be reversed. It is beyond question, of course, that a conviction based on a record lacking any relevant evidence as a crucial element of the offense charged . . . violates due process . . . " (Internal quotations and citations omitted.)

It would seem that the recent holding in *Jackson v. Virginia,* 61 L. Ed. 2d 560 (1979) is relevant to this Court's evaluation of the evidence in this case. The holding in *Jackson* points to the appellate re-evaluation of all the evidence to ascertain whether a jury's verdict in a criminal case was founded "rationally." It is true that that case dealt with federal review of a state conviction. But the case

again explains that appellate review is not limited to finding some evidence to sustain a conviction. It is the rationality test which governs and that test was again analyzed in *Jackson.* Furthermore, and most ironically the conviction in *Jackson* was not based upon a lay jury arriving at a verdict but at a Judge's arriving at a verdict, Jackson having waived a jury. In the maiority opinion authorized by Mr. Justice Stewart, it was held that a state conviction was void if it did not conform to the constitutionally rooted (due process clauses of the 5th and 14th Amendment to the Federal Constitution) requirement of guilt to be established beyond a reasonable doubt. That the former holding in *Thompson v. Louisville,* 362 U.S. 199 (1960) to the effect that a state conviction passes due process muster if it rested on some evidence, but not if there was no evidence. The new standard thus applied to the states and obviously a federal standard applicable to a federal conviction was that a criminal conviction can only be sustained if there is sufficient evidence that would justify a "rational" trier of the facts in arriving at the guilty verdict. This was further explained on page 571 of 61 L. Ed. 2d where it was stated, in part, that:

> " . . . A doctrine establishing so fundamental a substantive constitutional standard must also require that the fact finder will rationally apply that standard to the facts in evidence. A reasonable doubt, at a minimum is one based upon reason. Yet a properly instructed jury may occasionally convict even when it can be said that no rational trier of fact would find guilt beyond a reasonable doubt, and the same may be said of a trial judge sitting as a jury. In a federal trial such occurrence has been traditionally deemed to require reversal of the conviction . . . " (Omitting internal quotations and citations).

As stated in 93 Harvard Law Review, page 210, at pages 215-216:

> "The implications in Jackson are not limited to the habeas corpus context. The majority opinion addressed the relevant merits of 'some evidence' and 'rationality' standards and concluded that due process compelled a new test. Previously the Constitution was viewed as demanding only that courts evaluating criminal convictions seek 'some evidence' in support of the verdict. Judge-made rules requiring more than that varied considerably, at least in form. *After Jackson, state and federal courts assessing the evidence either at the trial level or on direct review will presumably be obligated to apply the 'rationality' test . . . .* " (Omitting footnotes and emphasis supplied).

This therefore necessitates some definition of "rational" as we emphasized as the standard in reviewing sufficiency of trial evidence in federal convictions. "Rational" found in 36 Words and Phrases, 209, 210 is explained as "reasonable, acting according to the dictates of reason, not excessive, just, honest, equitable, fair, suitable, moderate, tolerable."

On page 210 it was further stated that the word "rational" is not restricted to a legal or technical meaning and refers to a dictionary definition as including reason, faculty of reasoning, endowed with reason and understanding, agreeable to reason, not absurd, preposterous, extravagant, foolish, fanciful; it is linked in the definition as "judicious."

It is further submitted that in assessing the adequacy of evidence as a basis for a rationally founded verdict the demanding standard of proof namely beyond a reasonable doubt, that a distinction be drawn between a verdict arrived at "rationally" or a verdict arrived at by means of "rationalization." "Rationalization" can be utilized to justify any conclusion. However, it is humbly submitted

that justifying the verdict by rationalizing does not mean the standard hereinabove described.

Furthermore, a quantification of evidence may be a relevant factor in appraising the record underlying a criminal conviction and a review of the sufficiency of evidence. Not a fixed or mechanical quantification relating to the numerosity of the items of evidence, real, testimonial and stipulated, but a quantitative assessment as to the facets of evidence, meeting a qualitative standard that gives evidentiary meaning to the evidentiary components of a case to the jury. For this the appellant relies on the analysis of Chief Judge Jack Weinstein in *U.S. v. Fatico,* 458 F. Supp. 388 (E.D.N.Y., 1978) which was affirmed by the Court of Appeals Second Circuit in 603 F. 2d 1053 (1979); see also footnote 9 at page 1057 thereof. Judge Weinstein in that case had to consider proof relevant in determining a sentence to be imposed upon a convicted offender. Among the other issues, Judge Weinstein dealt with three standards governing proof and had to decide which standard was relevant at a sentencing stage. That is not relevant here. However in discussing the three standards it was stated in regard to the "reasonable doubt standard" at page 406 of 458 F. Supp. that:

> "If quantified, the beyond a reasonable doubt standard might be in a range of 95+ percent probable . . . "

Judge Weinstein also drew on the relevant authorities and precedents and fortified his analysis with some imperical data found on pages 409 and 410 of his opinion. Thus on page 409 Judge Weinstein referred to a discussion in 86 Yale Law Journal 1299 at page 1311 which contained the findings of the author based on the interview with Jeffers in regard to the standards governing the decisional process. On page 410 Judge Weinstein referred to a state-

ment that the reasonable doubt standard according to a third of the judges interviewed was 100%; a third of the judges also arrived at 90% or 95% and the rest 80% to 85%. The results of a survey in the District Judges in the Eastern District of New York indicating that in regard to reasonable doubt the range of probability according to each of the judges, ten in all, ranged from 76% to 95% in regard to probabilities.

Finally, in regard to the alleged "consent" this is an indicia of innocence. Certainly if the Petitioner knew of the larcenous or wrongful acquisition and possession of the goods, or even if he knew he possessed the goods, or even if he knew such goods were in the store, he certainly would not have consented to a search of the store. There was certainly no consciousness of guilt in consenting assuming that the Petitioner validly consented and waived his rights under the Fourth Amendment to the Federal Constitution.

## THE DECISION OF THE COURT BELOW CONFLICTS WITH THE PRIVACY INTERESTS OF THE FOURTH AMENDMENT TO THE FEDERAL CONSTITUTION

There is no consent by the Petitioner so that the authorities could search the store maintained by Petitioner's wife but, rather, a submission to authority.

The authorities in this case claimed and it was so held by the Court below that the Petitioner "consented" to the search of the store in question. The circumstances surrounding the rendering of the consent were that the Petitioner was handcuffed; he was already under arrest and in custody of the agents for the offense embraced in Count 1 of the indictment. Moreover, while the agents told him that he need not consent and could require that the agents procure a search warrant, for a layman as the Petitioner

was, and is, this reference to a warrant could have impressed him as a mere formality rather than a process of a judge passing on the probable cause requirement underlying a search warrant, namely, that there be probable cause that the property to be seized was at the place to be searched, the necessity of a description in the warrant limiting and controlling the scope of the search and seizures, all embraced within the Fourth Amendment to the Federal Constitution.

Moreover, the Petitioner may very well have "consented" in order to avoid resulting shock to his wife or creating a disturbance in the store. Thus, he requested that when he was brought to the store the handcuffs be removed.

Be that as it may, waiver of such a fundamental right has recently been assessed by the United States Supreme Court in *U.S. v. Mendenhall,* ____U.S.____ (1980) 64 L.Ed. 2d 497 (1980). The issue of "consent" was considered there. However, it may fairly be said that the prevailing opinions did not carry a majority of the Court as to consent. Mr. Justice Rehnquist held that the authorities in that case did not "seize" a person where they merely approached a person at a public thoroughfare to ask a question, 510 of 64 L.Ed. 2d. In other words, the initial confrontation was held by two of the Court Judges not to be inoffensive. It was thus held that "consent" was voluntary because among other factors there was no "seizure" of Mendenhall's person and the Court then went on to decide the components of "consent."

However, three concurring Judges did not join that portion of Mr. Justice Stewart's opinion, those three assuming that Mendenhall was "seized," e.g., in custody at page 513 of 64 L.Ed.2d. Four Judges of this Court unanimously dissented in a holding on page 520 of 64 L.Ed. 2d stating that they were compelled to assume that Mendenhall was seized or arrested or detained. They then went on to consider "consent" holding that there was no

consent because there was merely a submission to authority.

Accordingly, merely acquiescing or giving a "consent" to the authorities to search is not a consent, it is a mere submission to authority.

In regard to the statement of the authorities that the Petitioner could require them to apply or to get a search warrant, see "Search and Seizure" by LaFave, Section 8.2(c), page 645, et seq. It was stated in part on page 648 that:

> ". . . , it may generally be said that a threat to *obtain* a search warrant is likely to be held to invalidate a subsequent consent if there were not then grounds upon which a warrant could issue, and likely not to affect the validity of the consent if the police then had probable cause upon which a warrant could issue. As to the latter situation, it has been expressly held that if in fact there were no grounds for the issuance of a warrant, then the well-founded advice of a law enforcement agent that, absent a consent to search, a warrant can be obtained, does not constitute coercion. This proposition rests upon the conclusion that the threats in such circumstances do not involve any deceit or trickery, but instead accurately informs the individual of his precise legal situation. But this means that under the better view the police acted their peril in threatening to obtain the search warrant; it is not enough that their threat was made in the good faith expectation that a warrant would issue, there must in fact be probable cause." (Internal quotations and footnotes omitted, emphasis supplied).

In regard to "consent" or "waiver," Fourth Amendment considerations, this Court is respectfully referred to *U.S. v. Vasquez,* U.S. Court of Appeals, Second Circuit, slip opinion, 6675. That case dealt with a myriad of Fourth Amendment issues such as arrest and seizures of

property. At pages 6715 to 6717 contains a recent summary of the perplexing issue of a proper waiver of a fundamental right. It is stated at page 6715:

> "The question whether a consent has been given freely and voluntarily, or whether instead it has been given in the impression that there is in fact no choice, is one to be answered from the totality of all the circumstances. Schneckloth v. Bustamonte, supra, 412 U.S. 227. It is clear that if officers represent that they already have a search warrant a permissive statement by the property owner cannot be considered a voluntary consent. The situation is instinct with coercion albeit colorably lawful coercion. Where there is coercion there cannot be consent. Bumper v. North Carolina, supra, 391 U.S. at 500. On the other hand, the fact that an officer states that a search warrant can be obtained does not necessarily constitute a coercive factor negating consent, and our Court has upheld finding of consent in circumstances where officers stated that they could apply for a warrant and would 'no doubt' obtain one . . . . ('the consent was with knowledge that the agents could and would obtain a warrant'). In Faruolo, however, the district court had found that the officer's 'advice was well grounded. There was no deceit or trickery,' 506 F.2d at 494, and we concluded that 'the well founded advice of law enforcement agent that, absent a consent to search, a warrant can be obtained does not constitute coercion.' . . . , in which there was no probable cause basis for the issuance of a warrant and the agents were aware of that fact, the court expressed reservation as to whether a consent would have been upheld if the agents had allowed the defendant to base his consent on the mistaken belief that a warrant could be obtained.
>
> We view the circumstances reflected in the present record as falling somewhere in the area bounded by Bumper v. North Carolina, supra, in which there could be no consent because the agents represented that they had a warrant, United States v. Faruolo, supra, in which the officers had a well founded belief that they would obtain a

warrant, and the hypothetical situation held the mistaken belief that a warrant would issue while the agents knew that was not probable cause . . . Although we do not believe the agents were required to keep the Medinas informed of the practicalities, questions remain as to whether the Medinas were misinformed, and their consents vitiated . . . The bare finding of the district court 'that Mr. Medina, a resident of the apartment *consented* to the search conducted' (emphasis in original) is inadequate to reflect whether or not all the pertinent factors were considered. At a minimum, detailed findings concerning the circumstances under which the alleged consents were given would be necessary to assess the validity of those 'consents'."

Thus, in assessing the issue of "consent" in this case, the Petitioner respectfully submits that in the absence of a valid search warrant all searches and seizures are presumably invalid except for narrow exceptions such as "consent." See, *Mincey v. Arizona,* 437 U.S. 385, at page 390.

There was no showing that the Petitioner in this case ever had contact with the criminal justice system or was sophisticated in regard to searches and seizures. Just what the phrase that the authorities could be required to get a warrant meant to this Petitioner is not shown from this record. The important thing about a warrant, was that even if the authorities procure a warrant, the function of the warrant is to limit the search and the seizures. Most importantly, the probable cause required for a warrant is that there be probable cause that the property be specifically designated and be at the place to be searched. See *Lo-Ji Sales v. State of New York,* 60 L. Ed. 2d 920 (1979). It was held there that the Fourth Amendment to the Federal Constitution did not permit the execution of a search warrant to be left to the discretion of the police and that the fact that a store was to be searched was not a

waiver or an indication to enter and go through the inventory. This is precisely what was done here.

## CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the Judgment Order and decision of the United States Court of Appeals, Third Circuit.

Respectfully submitted,

ARNOLD WALLACH
Counsel for Petitioner

HERMENA PERLMUTTER
*Of Counsel*

Dated: January 28, 1981

## APPENDIX A—JUDGMENT ORDER

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 80-1678

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UNITED STATES OF AMERICA,

vs.

MAZZA, BRUNO DOMENICO,

*Appellant.*

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Appeal from the United States District Court
for the District of New Jersey
(D.C. Crim. No. 79-00293-05)

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Submitted Under Third Circuit Rule 12(6)
December 5, 1980
Before: ALDISERT, HUNTER, and HIGGINBOTHAM,
*Circuit Judges.*

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*JUDGMENT ORDER*

After considering the contentions raised by appellant, to-wit, that (1) the adverse jury verdicts were not rationally supported by the evidence presented against the appellant and furthermore, the court should not have charged the jury that joint possession of the property involved in the second and third counts could be considered because there was no evidence to support such a charge; and (2) there was no consent in this case on the part of the appellant, as to the search of the store maintained by the appellant's wife because of the totality of circumstances; rather there was a submission to authority; it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT,

s/ Aldisert
Circuit Judge

Attest:

s/ M. Elizabeth Ferguson,
Chief Deputy Clerk
DATED: December 5, 1980

## APPENDIX B—JUDGMENT/COMMITMENT ORDER

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

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DEFENDANT BRUNO DOMENICO MAZZA
DOCKET NO. CRIMINAL 79-293

In the presence of the attorney for the government the defendant appeared in person on this date May 5, 1980 with counsel Peter Till, Esq.

PLEA—Not guilty.

FINDING AND JUDGMENT—There being a verdict of GUILTY. Defendant has been convicted as charged of the offenses of possession of stolen interstate freight (Count 2); receipt of merchandise stolen from interstate commerce (Count 3).

SENTENCE OR PROBATION ORDER—The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of four (4) years on each of Counts 2 and 3, to run concurrently.

SPECIAL CONDITIONS OF PROBATION—
ADDITIONAL CONDITIONS OF PROBATION—In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue

a warrant and revoke probation for a violation occurring during the probation period.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

CERTIFIED AS A TRUE COPY OF THIS DATE 5-8-80

Signed by U.S. District Judge Frederick B. Lacey

I HEREBY CERTIFY that the above and foregoing is a true and correct copy of the original on file in my office.
ATTEST:
ANGELO W. LOCASCIO, Clerk
United States District Court
District of New Jersey
By: s/ Colleen Melody
Deputy Clerk